Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term 1997

Leonard Salzman,

Petitioner,

v.

State of Wisconsin Department of Natural Resources
BFI Tire Recyclers of MN Inc.
George Meyer

Respondents

On Petition For Writ Certiorari to the
Wisconsin Court of Appeals District III

PETITION FOR WRIT OF CERTIORARI

In his own Behalf
Leonard Salzman
4610 Lahr Ave.
Wausau, WI 54403
715-845-2587

QUESTIONS PRESENTED:

1. Must a notice of hearing be provided by the state and a meaningful time to be heard when confiscating property possessed and used by the Petitioner?

2. Are the requirements of due process fulfilled by only allowing for an appeal from a summary decision of the Wisconsin Department of Natural Resources, making it the responsibility of the Petitioner to "chase justice" to regain control of confiscated property?

3. If an appeal is not taken from an administrative decision will that prevent the right of the Petitioner to access the court at a meaningful time and the court to take jurisdiction of a claim for injunction relief and compensation for damages of the Petitioner, because the Respondents prevented the Petitioner from the agreed upon benefits given the Petitioner under a stipulation?

PARTIES

Petitioner:

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George Meyer,
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JURISDICTIONAL STATEMENT

On July 25, 1997 the Wisconsin Supreme Court denied a petition to review the Court of Appeals decision dated May 20, 1997.

An Extension of Time was filed on October 30, 1997, and granted by the U.S. Supreme Court until December 22, 1997.

On January 6, 1997 this Petition was returned to Leonard Salzman for reformating to be returned in 60 days.

This appeal is being docketed in this Court timely. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a), 28 U.S.C. 2101(c) and 28 U.S.C. 2104

UNITED STATES CONSTITUTION

This case involves the Fifth and Fourteenth Amendments of the United States Constitution.

AMENDMENT V (1791)

No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public us, without just compensation.

AMENDMENT XIV (1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Leonard Salzman, (herein known as Salzman) in the 1970s began under a free market system, collecting and selling tires for recycling. The tires owned by Salzman have always been a material for trade.

Legislation concerning tires was passed in 1988. Wisconsin Statute 144.449

gives the Wisconsin Department of Natural Resources, (herein known as DNR), the authority to determine a tire pile a nuisance and power to abate it. (Appendix F)

On October 11, 1990 a letter, numbered NCD-90-14, (Appendix C), (herein known as DNR Order), was mailed to Salzman, from the DNR, in the form of an administrative Decision and Order. It included findings of fact and conclusions of law pursuant to Wis. Stat. 144.449, whereas the DNR found, Salzman's property to be a nuisance summarily, without any presentation of evidence or notice of a hearing, being provided to Salzman.

Case number 90-CV-1013, Petition for Declaratory Judgement was filed with the Circuit Court in December of 1990, and brought before Judge Ann Walsh Bradley. Salzman argues, the procedure, which

allows the DNR to summarily confiscate property without notice or hearing, under the authority of Wis. Stat. 144.449, is void of constitutional due process. The DNR filed a motion to dismiss on the grounds that if Salzman wanted a hearing he must request for Judicial Review within 30 days.

On June 19, 1991 (Appendix D) The Bradley renamed the the Declaratory Petition a Judicial Review and found that in order to have subject matter jurisdiction of Salzman's claim there must be strict compliance with Wis. Stats. 227. Bradley further states "This court is concerned that the petitioner may be deprived of property without an actual hearing." (Appendix D page 20a).

Bradley's dismissal, was affirmed on appeal by the Wisconsin Court of Appeals number 91-2246 on October 13, 1992.

(Appendix E) "We agree. . . Chapter 227 furnishes the exclusive remedy for any one aggrieved by a DNR order." Without any issues of Salzman's constitutional concerns being taken up by the Court for determination.

A petition for review from the Wisconsin Court of Appeals, appeal number 91-2246 to the Wisconsin Supreme Court was denied on January 12, 1993.

In April of 1992 the DNR had awarded a contract to BFI Tire Recyclers of MN Inc. (herein known as BFI), giving them all of Salzman's tires, for use by BFI in the operation of their recycling enterprise, before the outcome of the decision of the Appeal Courts.

On April 11, 1992 Case Number 92-CV-114 Petition for a Declaratory Judgement was filed with the Marathon County Circuit Court by Salzman, claiming

rights to his property (tires) for the continuation of his recycling business. Salzman asserts that his property which had been declared as a nuisance and threatened to be taken by the DNR order is now being offered for bid to a private corporation for profit without any hearings or determination of ownership or rights from any type of tribunal. Salzman first brought the issue that the "appropriate procedure" of 227 would not avail him of constitutional due process.

On April 19, 1993 the DNR, filed Case Number 93-CV-256, as an enforcement action for their DNR order (Appendix C) against the Salzman family naming Leonard Salzman, Alice Salzman, Anthony Salzman, Thomas Salzman, and others, as defendants. The DNR asks the Court for a judgment to gain access to the tires claiming they had ownership of them under the DNR order.

In these two cases no issues were litigated, however, because of the possible cost and length of a potential litigation to secure his rights and the desire for Salzman to continue his work, a Stipulation dated August 16, 1993 was formulated, starting things a new.

In the 18 months that followed Salzman sought the cooperation of the DNR, without response, for the licensing of a percentage of the tires for the continuation of his business in compliance with the 1988 regulations

BFI begin removing tires in December of 1994 to their recycling facility under a contract agreement between BFI and DNR before the existence of the stipulation.

Salzman, filed Case Number 95-CV-215 (herein known as the Thums case) on April 11, 1995 asking for a Restraining Order at a time when enough tires remained for

Salzman to continue his recycling operation. Salzman also petitioned the court for Compensation for the loss of his recycling enterprise and future revenues, because of the loss of his benefits under the Stipulation.

Salzman argued to the Court that the stipulation superseded earlier documents and started things a new, and so changed the situation that BFI's contract was null and void.

Salzman relied on the faith of the Stipulation for the opportunity to show the DNR that his recycling enterprise was viable in an attempt to gain a license for a percentage of the tires to remain for use in his recycling operations. The DNR did not in good faith act under the terms of the stipulation, but only to use the stipulation as the tool in which to gain access to all the tires.

To believe that Salzman would invest 20 years of his life and over $100,000 (one hundred thousand dollars) in the last 18 months to ensure its viability and to realize this venture, just to agree to throw it all away at the close of the stipulation is abhorrent. (Appendix A page 2a).

In the spring of 1995 - Salzman's recycling enterprise located in Wausau's M-2 zone, operating under permits granted by the city, was disassembled because no tires remained to operate the system.

In the motions, brought by the defendants in the Thums case, it was argued that since Salzman did not bring his issues within 30 days, under Chapter 227 procedures, of the date of the DNR order it is final and controlling in respects that it gives them title to the property.

Salzman in response points out to the court that the 227 procedures did not avail him of a constitutional due process, even though the DNR order gave Salzman a stated right to bring an appeal within 30 days in reality there was no appeal to be taken since there did not exist a record from any hearings afforded Salzman at the agency level to appeal from.

On December 28, 1995 (Appendix B) Judge Raymond Thums dismissed Salzman's claim, on briefs alone, pursuant to motions filed by the defendants finding that the DNR Order was final and controlling under the 227 procedures, ruling this claim for a loss under the Stipulation res judicata and found frivolous, for the purpose of awarding costs. (Appendix B page 11a)

Salzman filed motions for Evidentiary Hearings on the findings of frivolousness,

in an attempt to bring to the Court evidence that he held benefits under the Stipulation. The Court renamed these motions, as motions for reconsideration, and simply dismissed them on April 18, 1996.

Salzman, filed for appeal from the Thums case, number 96-2504, bringing to the Court evidence that he had a constitutional right to be heard in an original action to protect his benifits under the Stipulation, and that the Stipulation supersedes the agency's procedure.

The Wisconsin Court of Appeals (Appendix A page 1a & 5a) summarily affirms the trial courts decision on May 20, 1997, and on the motion of BFI, concluded that this appeal was frivolous.

The Court goes on to agree with Salzman that the 1993 stipulation and

judgment supersedes the earlier judgments. The Court of Appeals, further in their decision interprets the stipulation against Salzman without allowing him to bring evidence of his claim under the stipulation for determination.

Salzman, brought to the Wisconsin Supreme Court the claim that the Wisconsin Court of Appeals ruled the Stipulation as the controlling document and then made a determination of Salzman's rights to his property under that Stipulation, against him, without any opportunity to present evidence on that issue, which violates Salzman's constitutional due process.

Salzman also brought to the Wisconsin Supreme Court constitutional concerns under Wis. Stats. 144.449 and 227, which was brought before the lower Court but never addressed

On July 25, 1997 the Wisconsin

Supreme Court denied the petition to review the Appeal from Thums' decision on May 20, 1997.

No Court, in the history of this dispute, has taken up any issues concerning a violation of Salzman's constitutional due process or claims for his losses. The petitioner lost his business due to the confiscation of his property (tires) by the DNR, who was given unbridled authority under Wis. Stat. 144.449, which is a method void of constitutional procedures. In contrary with Fuentes v. Shevin 407 U.S. 67, (1972). All actions filed with the Courts by Salzman in an effort to defend his property, have been dismissed on motions by the respondents claiming "appropriate procedure" of Wis. Stat. 227. In contrary with Boddie v.Connecticut, 401 U.S. 371, (1971).

These same issues are now being brought up to this Court on Writ of Certiorari.

AUGMENT

DUE PROCESS RIGHT TO NOTICE

The DNR order issued to Salzman found his property tires a nuisance without any production of evidence or proofs to that fact. Than under the authority of Wisconsin Statute 144.449 the DNR ordered Salzman to process or remove the tires in a manner approved by the DNR. If the DNR does not approve of Salzman's actions, then the DNR will enter onto the property where the tire stockpile is located and confiscate the tires. At no time prior to the mailing of the final DNR order had a notice of, or a hearing been held, which changed the status of Salzman's property (tires), to a nuisance as defined in Wis. Stat. 144.449.

This is in contrast with the findings of the U.S Supreme court in Fuentes v. Shevin 407 U.S. 67, 83, (1972).

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."

The Court in the 1st Declaratory Petition found that the DNR may summarily issue an order to Salzman leaving him with only appeal rights under Wisconsin Statutes 227 to regain control of his property being confiscated. (Appendix D) This violates Salzman's due process rights under the fifth and fourteenth amendment

of the United States Constitution to "Notice" before his property is substantially effected. In Mullane v. Central Hanover Tr. Co., 339 U.S 306 (1950),

> Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court, "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case". Id., at 313.

DUE PROCESS

MEANINGFUL OPPORTUNITY TO BE HEARD

The Courts have traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. The basic understanding of due process is that the defendant to any

action has a constitutional right to raise a defense to the claims brought against him, in any complaint. The U.S. Supreme Court noted this in speaking from Boddie v. Connecticut, 401 U.S 371(1971) at 377, 387, "wherever one is assailed in his person or his property, there he may defend" Windsor v. McVeigh, 93 U.S. 27,277 (1876). The theme that "due process of law signifies a right to be heard in one's defense" Hovey v. Elliott, 167 U.S. 409, 417 (1897).

It has always been understood by the Courts that there has been no hearings or record created at the agency level. This fact is recognized in the Decision and Order of Judge Ann Walsh Bradley, dated June 19, 1991 "This court is concerned that the petitioner may be deprived of property without an actual hearing." (Appendix B page 3).

The Wisconsin Courts have published many cases outlining a defendants rights under Wisconsin Statutes 227. In Ashwaubenon v. State Highway Comm. (1962), 17 Wis. 2nd 120

> "One has a right before an administrative agency to make a record for judicial review in cases subject to review under ch. 227."

Under Omernick v. DNR, 100 Wis. 2d 234 at 248.

> "parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record."

Salzman does not make the claim that he has a right to appeal the DNR Order, but that under a 227 appeal, if taken, the Court would not allow him to raise any constitutional concerns to a right to due process, or provide him an opportunity to defend his property prior to the property

bring summarily confiscated.

This left Salzman with no chance to bring his issues to the Court, under the "appropriate procedure" outlined in Wisconsin Statutes 227. The Appellant Court misinterprets the Wisconsin 227 procedure, where hearings should be held, with possible rehearings, to create a record which can be taken up for judicial review, but the DNR never followed this procedure.

The Wisconsin Court of Appeals points out (page 3 of Appendix E)

> "By virtue of his failure to follow the appropriate procedures to appeal the 1990 DNR order, Salzman lost his right to challenge the procedures employed by the DNR as well as his claim that the cleanup constituted a confiscation of his property without due process."

The Court misses the understanding of Chapter 227 recognized in the Bradley decision (Appendix D) which points out the

issue "This court is concerned that the petitioner may be deprived of property without an actual hearing." The correct procedure has been pointed out in Ashwaubenon v. State Highway Comm. (1962), 17 Wis. 2nd 120 and Omernick v. DNR, 100 Wis. 2d 234

The DNR Order at its close (Appendix C page 17a) gave Salzman 30 days in which to take an appeal under Wis. Stats. 227, however that appeal would not avail Salzman of a meaningful opportunity to be heard, before confiscation of his property (tires), it only informed Salzman that he may file suit and post bond for a hearing over property already lost.

This Court found in Fuentes v. Shevin 407 U.S. 67, (1972), that it was not due process when the procedure available only allowed the party that lost property under a replevin to file suit to recover control

of the property, and noted in Fuentes supra.

> "So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

This Court held in Lynch v. Household Finance Corp., 405 U.S. 538, 552.

> "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172. "Rather, it has been read broadly to extend protection to 'any significant property interest," Boddie v. Connecticut, 401 U.S., at 379, including statutory entitlements.

It is the responsibility of an Appeals Court to look back on the lower tribunals actions and decisions to determine error, not the starting point for Salzman to try to regain control of his property lost summarily under the DNR order. This "appropriate procedure" of forcing Salzman to "chase justice" violates his rights to be given a meaningful opportunity to be heard under the fifth and fourteenth amendment of the U.S. Constitution.

DUE PROCESS

RIGHT TO ACCESS THE COURTS

The defense to the DNR enforcement action, filed on April 19, 1993, against the Salzman family was embodied in the 2nd Declaratory Petition, filed by Salzman April 11, 1992, see (Appendix A page 2a).

In Boddie v. Connecticut, 401 U.S 371 (1971) at 376, 377.

> "Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process in not only the paramount dispute-settlement technique, but, in fact the only available one."

Due to the possible cost and length of a potential litigation to secure their rights, on August 16, 1993 a Stipulation was entered into between Salzman and the DNR, giving rights to both parties and starting things a new.

Salzman agreed under the Stipulation to dismiss his argument of his claim of due process violations, for benefits under that Stipulation, relying on the terms of the stipulation and the negotiated good faith effort under the stipulation by the DNR to continue his business.

The DNR did not in good faith respond to Salzman or provide cooperation, leaving him once again unable to operate under the 1988 regulations.

His stock in trade (the tire pile) was physically removed by BFI, causing the loss of his business, and his benefits under the stipulation.

Salzman filed for Injunction relief to protect his property and a claim for Compensation of his loss (the Thums case), in the Marathon County Court, on April 11, 1995.

In United States v. Kras, 409 U.S. 434 (1973) the Court speaks of the difference of what will materially alter a constitutional sense. In Kras, gaining or not gaining a discharge in bankruptcy will effect no change with respect to basic necessities. Whereas in Boddie Supra, the petitioner in that case had no other

recourse but to enter the courts to dissolve their marriage as a constitutional right. In this Case, Salzman, was compelled to bring suit against the DNR for protection of his property.

The right to own and enjoy the fruits of a business is a propriety, which holds an equivalent to property, and is a constitutional right. As in Torao Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). The right to fish was protected by our constitution. Salzman's recycling business is protected under the constitution as a propriety.

Judge Raymond Thums dismissed this action as res judicata finding the DNR order final, in that it found the tires a nuisance and of no value under Wis. Stat. 144.449.(Appendix B)

The Wisconsin Court of Appeals

corrects Thums (Appendix A page 4a) by stating that:

> "Salzman correctly notes that the 1993 stipulation and judgement supersedes the earlier judgements." However the Court of Appeals summarily affirms the trial court's opinion in finding res judicata." (Appendix A page 4a) and points out "By virtue of his failure to follow the appropriate procedures to appeal the 1990 DNR order, Salzman lost his right to challenge the procedures employed by the DNR as well as his claim that the cleanup constituted a confiscation of his property without due process."

The Wisconsin Court of Appeals go on further in their decision to interpret the stipulation against Salzman without allowing him to bring evidence of his claim under the stipulation for determination, barring him from access to the Courts, to bring this claim for Injunction relief and Compensation of his loss under a good faith belief in the stipulation.

This Court found in Lynch v. Household Finance Corp., 405 U.S. 538, 552.

> "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

The Courts barred Salzman access to bring his claim, by allowing the DNR to bring a remitted document (the DNR order) void of constitutional due process as controlling which triggered res judicata.

Salzman holds a constitutional right for a meaningful time to be heard on a claim for relief. Similar to in Boddie v. Connecticut, 401 U.S. 371, One has a right to defend as a plaintiff when the government interferes with or wants to take constitutionally protected property interest use in a propriety.

This violates Salzman's due process rights to access the courts at a meaningful time to seek injunction and claim for compensation for Salzman's loss of his recycling enterprise caused by the actions of the DNR in concert with BFI in violation of the stipulation.

CONCLUSION

Salzman lost his property (tires) due to a procedure initiate by the DNR, which was void of constitutional due process. The Court in Bradley's decision (Appendix D) recognizes the problem, that there was no hearing afforded to Salzman allowing him to create a record, although dismissing Salzman's constitutional claim for lack of subject matter jurisdiction under the 30 day rule of Wis. Stat. 227.

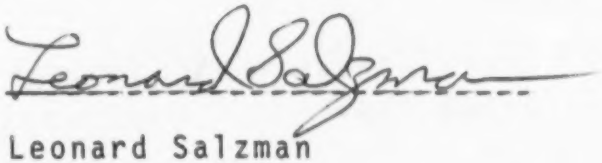
After the DNR in bad faith worked in contrary to the terms of the stipulation,

Salzman filed a claim for injunction relief and compensation for his loss. Thums would not allow Salzman to bring any evidence to his claim, and after finding the DNR order controlling dismissed Salzman under res judicata. This violated Salzman constitutional right to a meaningful opportunity to be heard in an original action.

The Wisconsin Court of Appeals does correct Thums in finding the stipulation controlling, however they summarily affirm Thums' decision. The Wisconsin Court of appeals violates Salzman's Constitutional due process by ruling the issues of his claim under the stipulation, against him, without giving Salzman an opportunity to bring his evidence, to create a record at the trial court level in which to make such a ruling, preventing him access to the Courts for relief.

THERE FOR, in light of the due process violations against Salzman, under the fifth and fourteenth amendments, Salzman asks this Court, considering the questions asked in this petition, to take this issue up for certiorari to remedy the errors of the Wisconsin Courts.

In his own behalf,



Leonard Salzman
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APPENDIX AA

Office of the Clerk
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July 25, 1997

TO:

Hon. Raymond Thums
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You are hereby notified that the Court has entered the following order:

No. 96-2504 SALZMAN v. BFI TIRE RECYCLERS OF MN, Inc., et al. L.C. #95-CV-215

A petition for review pursuant to Wis. Stat. §808.10 having been filed on behalf of plaintiff-appellant-petitioner, Leonard Salzman, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Bradley, J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX A

DISTRICT III
Office of the Clerk
COURT OF APPEALS
110 E. Main Street, Suite 715
P.O. Box 1688
Madison, Wisconsin 53701-1688

Marilyn L. Graves Clerk

May 20, 1997

Case Number 96-2504
L.C. #95-CV-215

Leonard Salzman
v.
Wisconsin Department of Natural Resources
BFI Tire Recyclers of MN, Inc. et al.

Before: Cane, P.J., LaRocque and Myse, JJ.

Leonard Salzman appeals judgments dismissing his action against BFI Tire Recyclers of MN, Inc., the Wisconsin Department of Natural Resources and its secretary, George Meyer. The trial court concluded that the actions were barred by res judicata and awarded the defendants their actual attorney fees because the actions were frivolous. We summarily affirm the trial court's judgements and, on the motion of BFI, conclude that this appeal is frivolous. Therefore, we remand the matter to the circuit court to grant BFI an additional judgment for the reasonable attorney fees engendered by this appeal.

On October 11, 1990, the DNR issued an administrative order declaring 600,000

waste tires stored on Salzman's property to be a public nuisance the had to be abated. Salzman did not follow the procedures for appealing that decision set out in ch. 227, Stats. Rather, he commenced an action for a determination of his property rights in which he challenged the constitutionality of §144.449, Stats. The trial court dismissed that action as an untimely attempt to secure judicial review under ch. 227 and this court affirmed that decision.

In April 1993, Salzman filed another action in the circuit court requesting a declaratory judgement regarding his rights to his property (the tires) for the continuation of his recycling business. The DNR then brought an action to enforce its order to abate the nuisance. The parties ultimately reached a stipulated agreement, approved by the circuit court, in which the parties agreed that Salzman would remove and lawfully dispose of or recycle 100,000 waste tires from the site. The stipulation provided in part:

> No license will be issued by DNR for the recycling and removal of these waste tires. Rather, the defendants, pursuant to this stipulation and the judgement based thereon shall be permitted to lawfully conduct their recycling and removal of the remaining 100,000 waste tires and the waste material, subject to DNR oversight and approval. The recycling or processing of waste tires not associated with the existing waste tire stock pile or waste tire material remaining on the site after

> December 1, 1994 will require an operating license issued by DNR, and such an operation is not authorized or agreed to as a part of this stipulation. A maximum of 500 tires may be kept on the site for resale purposes...

The stipulation further provided that beginning December 1, 1994 without further recourse to court action, the Salzmans are prohibited from storage or disposal of the waste tires, except as may be permitted by DNR license, and they may not interfere with the removal by the DNR or its contractor of all waste tires not authorized by DNR license.

On December 5, 1994, the DNR and BFI attempted to remove the waste tires pursuant to the stipulation. After an additional court hearing, BFI began removal of the waste tires. In April 1995, Salzman commenced this action asking for compensation for loss of his tires and future revenues from his recycling business, claiming rights pursuant to the stipulation. The trial court dismissed the action on the basis of res judicata and found the action frivolous.

We conclude the five causes of action pleaded against the three defendants impermissibly attempts to annul or contradict the judgments and stipulation that apply to these parties. See Sinnott v. Porter, 57 Wis.2d 462,466,204 N.W.2d 449,451(1973). By virtue of his failure to follow the appropriate procedures to appeal the 1990 DNR order, Salzman lost his right to challenge the procedures employed by the DNR as well as his claim that the cleanup constituted a confiscation of his property without due

process. Salzman correctly notes that the 1993 stipulation and judgment supersedes the earlier judgments. Nothing in the stipulation, however, grants Salzman any compensation for his loss of the tires, and the stipulation does not compel the DNR to issue any permits or licenses that would allow Salzman to continue his business.

Salzman repeatedly argues that it is "abhorrent" to believe that he would stipulate to the loss of $100,000 in investment and twenty years of his life. At the time the stipulation was reached, Salzman had little bargaining power. The stipulation terminated an enforcement action by the DNR and Salzman's action that was clearly barred by res judicata. The agreement gave Salzman time to attempt to dispose of tires on more favorable terms. The stipulation and the prior judgments gave the DNR exclusive control over the tires without compensation to Salzman. The res judicata effect of the stipulation and prior judgments cannot be circumverted by suing the secretary of the DNR or its independent contractor, BFI.

The trial court properly found this action frivolous. As action is frivolous when the person bringing the action knew or should have known that it was without any reasonable basis in law or equity. See 814.025(3)(b), STATS. A pro se litigant is not exempt from the objective standard of review and may be judged liable for costs and fees if a reasonable person should have known the action was frivolous. See Verex Assur. Inc. AABREC, Inc, 148 Wis.2d 730,736, 436 N.W.2d 876,878 (Ct.App. 1989);Tracy v. DOR,133 Wis.2d 151,163-64, 394 N.W.2d 756,761 (Ct.

App. 1986). Salzman was repeatedly warned that this action could be deemed frivolous. He ignored those warnings. This appeal is a continuation of Salzman's refusal to accept the results of the previous judgments and stipulation in total disregard of the warnings that the positions he advanced in this appeal are frivolous. Therefore, we remand the matter to the trial court to grant judgment in favor of BFI for the reasonable attorney fees it incurred in this appeal. The DNR and secretary Meyer have not requested any award based on frivolousness.

IT IS ORDERED that the judgments are summarily affirmed and the cause is remanded for a determination of the reasonably attorney fees to be awarded BFI as a result of this appeal.

Marilyn L. Graves
Clerk of Court of Appeals

APPENDIX B

STATE OF WISCONSIN
CIRCUIT COURT BRANCH II
MARATHON COUNTY

LEONARD SALZMAN ,
Plaintiff,
V.
BFI TIRE RECYCLERS OF MN, ET AL,
Defendants.
Case No. 95-CV-215

OPINION

All of the defendants have filed at least one motion to dismiss, challenging the law suit on grounds of res judicata, collateral estoppel, failure to state a cause of action and immunity.

FACTS

The plaintiff , Leanard Salzman (Salzman) accumulated a large waste tire pile on his premises in marathon County. It is stated in the briefs that the pile was in excess of 500,000 tires.

The Department of Natural Resources by order NCD-90-14 issued on October 11, 1990 determined that the waste tires accumulated by Leonard and Alice Salzman constituted a violation of NR 502.04(6)(b) of the "Wisconsin Administrative Code" and Sec 144.449(4) of the "Wisconsin Statutes" and constituted a nuisance and tire dump. The order also provided that the Salzman's take the necessary corrective action to abate the nuisance through a specific order with detailed provisions

The DNR order also provided a "Notice of Appeal Rights" stating that the Salzmans had 30 days after the date the

order was mailed to request an "administrative review" before a hearing Examiner Pursuant to Sec. 227.28(2) of the Wisconsin Statutes.

Subsequently Salzman started an action for declaratory judgment in Branch 3, Marathon County Circuit Court, case number 90-CV-1013, seeking a court order that the DNR order of October 11, 1990 was unconstitutional and of no force and effect. By Decision of the Honorable Ann Walsh Bradley, the action was dismissed when the trial court ruled that Salzman's action was in effect a petition for judicial review of the DNR order of October 11, 1990 under Ch. 227 Wis. Stats.

The Order of Dismissal of Judge Bradley was appealed to District III Court of Appeals and by Decision dated October 13, 1992, Judge Bradley was affirmed. Agreeing with Judge Bradley that Ch. 227 provided the exclusive remedy for anyone aggrieved by a DNR order. The Court of Appeals further stated that if a party fails to avail himself of the Ch. 227 remedy he has no further right to judicial review.

Salzman started another action originally in Branch 4, Marathon County Circuit Court Which was subsequently assigned to Branch 3, case number 92-CV-114, where again filed an action against the Wisconsin Department of Natural Resources. The chairman of the DNR and one Paul Kozier again seeking a declaratory judgment that the October 11, 1990 DNR order was unconstitutional and improper.

The State of Wisconsin, as plaintiff, brought an action against Leonard Salzman, his wife, Alice and sons, Anthony and Thomas in file number 93-CV-256 in Branch

2 of the Matathon County Circuit Court, seeking enforcement of the Department of Natural Resources' order of October 11, 1990. This lawsuit was resolved by stipulation of the parties which was entered into dated August 16, 1993. Salzman was represented by counsel in this action. The stipulation set out how the DNR or its contractors would gain access to the property, how they would remove the tires and other details for cleaning up the sit as well as dismissing all previous actions between the parties including 92-CV-114.

Pursuant to that stipulation , the DNR filed on a motion against Salzman for contempt to enforce the order agreed to by stipulation. This court held a hearing on December 12, 1994, and a order was entered at that time which further refined access of the Department of Natural Resources and their contractor BFI, Inc. That order was signed by this court on December 19,1994.

Salzman then brought this current action before this court in file number 95-CV-215, again seeking a declaratory judgment with five separate causes of action.

DISCUSSION

The Department of Natural Resources order of October 11,1990 finding the tires to be a nuisance and ordering Mr. Salzman to abate the nuisance is a final order. Salzman failed to appeal the DNR order within 30 days for an administrative review hearing before a hearing examiner and by failing to do so and instead started the circuit court action in 90-CV-1013 he chose the wrong forum to challenge the DNR order. The court of Appeals has ordered that the exclusive

remedy for challenging the validity of the DNR order was throught the administrative appeal process which Mr. Salzman failed to do. Mr. Salzman cannot challenge the validity of the DNR order. It is over. It is final. It is complete. It is done and any issue concerning the validity of the DNR order is res judicata.

The only cause of action in plaintiff's complaint against the defendant, BFI, is the fourth cause of action, claiming that BFI committed a theft or misappropriation pursuant to Sec. 943.20 of the Wisconsin Statutes. Salzman is arguing the wrong law and in fact is arguing that he can enforce a civil remedy through a criminal statute. This is improper and cannot be done.

Further, BFI is the contractor of the DNR and as such BFI Would be responsible to the DNR and not to Salzman and has no connection to Salzman through any legal premise whatsoever.

George Meyer, the defendant, is secretary of the Department of Natural Resources and has no direct involvement in this particular action other than the fact that he is secretary of the Wisconsin Department of Natural Resources. This is an action against the Wisconsin Department of Natural Resources and as such Mr. Meyer is acting in its behalf and therefore is not subject to suit individually.

Salzman's first cause of action is barred by the Doctrine of Res Judicata. Any challenge to the DNR order of October 11, 1990 is improper and cannot stand. Salzman has challenged the validity of that order in three separate actions in circuit court for declaratory judgment and each time has been told that the order is final and complete.

The second cause of action in the complaint also attacks the 1991 order and again this cause of action is improper because of the Doctrine of Res Judicata. The matter has been decided and is final for lack of proper appeal by defendant.

The third cause of action alleges that the DNR and its contractor, BFI, wrongfully took over 500,000 tires from Salzman's property. This cause of action is barred by Stipulation entered into by the defendant on August 19, 1993, in case number 93-CV-256. In that stipulation, plaintiff agreed to allow the DNR and its contractors to come upon the premises to remove the tires and set up a procedure for doing so.

The fourth cause of action of action alleges the DNR removed tires of a value of over $1,000,000. The DNR order determined that the tires were waste tires and were a nuisance and as such by Definition do not have value. Also the 1993 stipulation and order Provided for the removal which Salzman allowed by his agreement. Compensation is not an issue.

Salzman was given a significant amount of time subsequent to the entry of the stipulation and order to remove or sell the tires from the premises before the DNR came back to this court seeking a contempt order against the defendant allowing the DNR to remove the tires from the property according to the stipulation of the parties.

The fifth cause of action has already been discussed and the action against the Department is barred by the Doctrine of Res Judicata and DNR secretary, George Meyer is also protected through the fact that he is an officer of a state agency and is not directly responsible and is not

a proper defendant in an action such as that pending before this court.

DECISION

The motion to dismiss of both the Wisconsin Department of Natural Resources and BFI tire Recycles is granted with actual costs and actual attorneys fees pursuant to Sec. 814.025 of the Wisconsin Statutes. This court has determined that this action by Salzman is frivolous.

Salzman has been forewarned and told many times in the past that the nuisance order of the Department of Natural Resources is final and can no longer be contested, further, that Salzman agreed to allow the tires to be removed and is attempting to challenge that voluntary agreement and further because of all of the previous circuit court actions and court of appeals decision determining the finality of the DNR order.

Each of the defendants, BFI and Department of Natural Resources shall submit their actual attorneys fees and costs to this court with a copy to the plaintiff, Leonard Salzman, within 30 days from the date of signing this Opinion and upon receipt this court will hold a hearing upon notice to determine if the attorneys fees and costs are reasonable the circumstances.

The DNR shall also prepare an order in conformity with this opinion granting the notions to dismiss.

Dated at Wausau, Wisconsin, this 21st day of November, but signed this 28 day of December, 1995

BY THE COURT:

RAYMOND F. THUMS
Circuit Judge, Branch 2

APPENDIX C

October 11, 1990 File Ref: 4190

CERTIFIED MAIL ENTRACK FID No. 737106040

Mr. and Mrs. Leanard Salzman
4610 Lahr Avenue
Wausau, Wi 54401

Dear Mr. and Mrs. Salzman:

Enclosed is an Order issued by the Department of Natural Resources (Department) under §.144.431, 144.47, and 144.449(2), Stats., for the unlicensed storage or disposal of waste tires and for nuisance waste tire abatement. The Department has determined your waste tire stockpile to be a public nuisance as defined in §.144.449(1)(a), Stats.

If you wish to contest this Order, please refer to the end of the Order. Requests for appeals must be made in accordance with §.NR2.05,Wis Adm.Code. The time period for seeking review of this Order begins with the date of this letter.

Failure to comply with the Order may result in the Department taking any action necessary to abate the nuisance, including entering the property where the tire stockpile is located and confiscating the waste tires, arranging to have the waste tires, processed or removed and/or referring this to the Attorney General for enforcement. The Department may ask the Attorney General to initiate civil action to recover from the person responsible for the nuisance the reasonable and necessary costs incurred by the Department for its nuisance abatement activities.

If you have any questions concerning

this matter, please contact Loren Brumberg, Tire Recovery Specialist, at (715)839-3770 or Roy Jacobson, Environmental Enforcement Specialist, at (715)369-8935.

Sincerely,
John LaFontaine, Director
Office of Environmental Enforcement
Division of Enforcement

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the matter of the Unlicensed Storage or disposal and the alleged nuisance caused by a tire dump located in the SE¼ of the SW¼ and the SW¼ of the SE¼ of Section 4, T28N, R8E, Town of Weston, Marathon County, Wisconsin

Order No. NCD-90-14
ENTRACK FID No. 737106040

FINDING OF FACT
CONCLUSIONS OF LAW AND ORDER

FINDING OF FACT

1. The property owned by Leonard Salzman located in the SE¼ of the SW¼ of Section 4, T28N, R8E, Town of Weston, Marathon County, Wisconsin, and the property owned by Alice Salzman located in the SW¼ of the SE¼ of Section 4, T28N, R8E, Town of Weston, Marathon County, Wisconsin, (the Salzman property), is being used to store or dispose of waste tires. No license for such storage or disposal has been issued under s. 144.44(4), stats.

2. On December 8, 1988, The Department of

Natural Resources (Department) inspected the Salzman property. During the inspection, the Department determined that more than 600,000 tires were being stored or disposed of on the property and that the storage of disposal of the tires presents an unreasonable danger to public health, safety of welfare or the environment.

3. On July 30, 1990, the Department notified Leonard Salzman and Alice Salzman requesting that the tires be processed and/or removed. The notification required Leonard and Alice Salzman to respond to the Department's request within 20 days from the date of the letter regarding their intentions to have the tires processed and/or removed.

4. Leonard Salzman and/or Alice Salzman have failed to take the actions requested by the Department to initiate activities to abate the nuisance caused by the tire pile.

CONCLUSIONS OF LAW

1. The collection and transportation of waste tires by Leonard and Alice Salzman constitutes a violation of s. NR 502.04()(b), Wis Adm. Code, and s. 144.44(4), States.

2. The tires stored or disposed of in the SE¼ of the SW¼ and the SW¼ of the SE¼ of Section 4, T28N, R8E, Town of Weston, Marathon County, Wisconsin, constitute a nuisance and tire dump as those terms are defined by ss. 144.449(1)(a) and (b), Stats.

3. The Department has authority under ss. 144.431(2)(b), 144.47(1)(a)1., Stats., to cause written notice to be served upon the alleged violator and require necessary corrective action be taken.

4. The Department notified Leonard and Alice Salzman as the persons responsible for the nuisance, in accordance with ss. 144.431, 144.449(2) and 144.47, Stats., and requested the tires be removed.

5. The Department has the authority under ss. 144.431(2)(b), 144.47(1)(a)1., and 144.449(2), Stats., to order the person responsible for a tire dump to abate the nuisance.

6. This order is a reasonable and necessary measure to assure compliance with ss. 144.44(4), 144.449, Stats., and ch. NR 502, Wis. Adm. Code.

7. This order is enforceable under ss. 144.449(2r), 144.98, and 144.99, Stats.

ORDER

The Department of Natural Resources therefore orders that Leonard and Alice Salzman:

1. Shall not collect or transport any solid waste (waste tires) until an operating license issued by the Department is obtained.

2. Within 20 days of the effective date of this Order, submit an approvable work plan to the department for abating the nuisance conditions caused by the tire dump. The work plan shall include at a minimum:

a. The method that will be employed to abate the nuisance.
b. The ultimate disposal location for the waste tires.
c. The time frame to abate the nuisance must be within 240 days of the effective date of this order.
d. The business name, address, contact person and Department license number of any landfill, solid waste storage facility, waste tire processor or transporter involved in abatement activities.

3. Within 60 days of the effective date of this Order, begin removal of the waste tires to a licensed storage or disposal facility or a processor or facility specifically exempted by the Department from licensing. However, the Department reserves the right to approve, approve conditionally, or reject in whole or in part the work plan submitted under provision 1 of this order. If the work plan is rejected, the Department reserves the right to abate the nuisance in accordance with s. 144.449(2), Stats.

4. Within 240 days of the effective date of this order, complete the abatement of the nuisance conditions caused by the waste tires in accordance with the work plan as approved by the Department.

5. Monthly progress reports shall be submitted to the Department by the 10th of each month that abatement activities occur. The progress reports shall include at a minimum:
a. The quantity of tires removed from the site to date.
b. The disposal location of the removed tires.

c. The quantity of tires remaining on site.

Two copies of each progress report shall be submitted to each address:

Department of Natural Resources
Loren Brumberg, ECA
2004 Highland Avenue
Eau Claire, WI 54701-4346

Department of Natural Resources
Paul Koziar, SW/3
P.O. Box 7921
Madison, WI 53707

NOTICE OF APPEAL RIGHTS

This order shall become effective unless a request for a hearing to contest the issuance of this order, or any of its terms, is filed with the Department within 30 days after the date this order is mailed. All hearing requests shall be filed either by delivery to the office of the Secretary of the Department at 101 South Webster Street, Madison, Wisconsin, or by certified mail addressed to the Office of the Secretary, Department of Natural Resources, P.O. Box 7921, Madison, Wisconsin 53707. If a hearing is requested, this order shall not become effective until the hearing examiner issues a decision affirming or modifying this order. This notice is provided pursuant to s. 227.48(2), Wis. Stats.

Dated at Madison, Wisconsin the 11th day of October, 1990

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

John LaFontaine, Director
Office of Environmental Enforcement

Division of Enforcement

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT BRANCH III
MARATHON COUNTY

Leonard Salzman, Petitioner
vs.
State of Wisconsin Department of Natural Resources, and State of Wisconsin Department of Justice, Respondents.

DECISION AND ORDER
Case No. 90-CV-1013
June 19, 1991

The respondents, State of Wisconsin Department of Natural Resources, and State of Wisconsin Department of Justice, have filed a motion to dismiss the Petition for Declaratory Judgment asserting that (1) this court is without jurisdiction, and, (2) that the Petition and Amended Petition fail to state a claim against the respondents upon which relief can be granted. Because there has not been compliance with Sec. 227.53(1), Wis. Stats. this court does not have jurisdiction of the dispute. The plaintiff, Leanard Salzman, moves the court to dismiss the answer filed by the State of Wisconsin, Department of Natural Resources, and State of Wisconsin Department of Justice, asserting that the answer was not timely made pursuant to Sec. 802.06(1), Wis. Stats. The plaintiff also asserts that the respondents' answer is legally insufficient. Because the response to the Amended Petition was timely filed and because the response is legally sufficient, the motion to dismiss

the answer to the Amended Petition is denied.

In order for a circuit court to have subject-matter jurisdiction of a dispute, there must be strict compliance with Sec. 227.53(1), Wis. Stats. Johnsonville Sausage v. Revenue Dept., 113 Wis. 2d 7, 8-9, 334 N.W. 2d 269 (Ct. App. 1983). YMCA of Beloit v. Revenue Dept., 141 Wis. 2d 907, 417 N.W. 2d 39 (Ct. App.1987). Sec. 227.53(1), Wis. Stats. requires that if a party seeks review of an agency order, the party must seek review within 30 days. The Department of Natural Resources issued its order on October 11, 1990. That date marks the commencement of the running of the 30-day time period during which the petitioner must seek administrative review of the Order or request judicial review of the Order. November 12, 1990 marks the deadline for the petitioner to either request the administrative hearing to contest the Order or to seek judicial review of the Order. On December 14, 1990, the petitioner filed the first pleading requesting a declaratory judgment.

Although at the motion hearing the petitioner sought to introduce and discuss a November 2, 1990 letter sent to the Department of Natural Resources by the petitioner, it was ruled inadmissible at the hearing. Thus, this court is unaware of the actual content of the November 2, 1990 letter. It is possible that the contents of that letter and the subsequent response of the Department on November 12, 1990 in some way tolled the running of the 30 days. However, because the petitioner never previously pled, argued, or referred to this November 2, 1990 letter, or as yet

to suggest that it may toll the running of the time, the respondents appropriately objected to the introduction of the letter at the hearing.

The petitioner cannot circumvent the requirements of Sec. 227.53(1), Wis. Stats. by using the declaratory judgment procedure. "Where there is a specific procedure for review of administrative action and court review of the administrative decision, the remedy before the administrative agency must be pursued prior to resort to judicial remedies." Jackson County Iron Co. v. Musolf, 134 Wis. 2d 95, 101, 396 N.W. 2d 323 (1986). The court in the Jackson County case at 101 opined that when a party does not seek redress of a grievance which might have been correctable by the administrative agency, the party may not seek declaratory relief. A party is barred from seeking declaratory relief unless it can show that an appeal to the administrative agency would not afford adequate relief. Jackson County Iron Co. at 103.

This court is concerned that the petitioner may be deprived of property without an actual hearing. The petitioner asserts that since he was never before any agency or proceeding and since there was no hearing, that he is not bound by the time limits for review set forth in the statute and the administrative rules. The argument, however, is somewhat circuitous in that the October 11, 1990 order advised the petitioner of his right to request a hearing and the time limits for that request. The petitioner failed to make the request within the required 30 days.

The petitioner is trying to get in through the back door what he could not

get in the first instance get through the front door. A court does not have subject-matter jurisdiction under the declaratory judgment procedure if the court would not have had jurisdiction in the remedial action. Borden Co. v. McDowell, 8 Wis. 2d 246, 256 99 N.W. 2d 146 (1959). Declaratory relief authorizes the court to take jurisdiction at a point earlier in time than the court would ordinarily act. In this instance, the petition for declaratory relief is really a camouflaged and untimely petition for judicial review.

Because this court finds at the outset that the action for declaratory judgment cannot be maintained, it is not necessary for this court to address whether or not a claim has been asserted against the respondents upon which relief can be granted.

This court next turns to the issue raised by the petitioner as to whether the response of the State of Wisconsin, Department of Natural and the State of Wisconsin, Department of Justice, is timely and legally sufficient.

Under Sec. 801.09(2)(a), and 802.06(1), Wis. Stats. the state or agency of the state has 45 days to make a responsive pleading to a complaint or petition. The initial petition was filed on December 14, 1990. However, an amended petition was filed on January 16, 1991. That amended petition was filed within the initial 45 day limit and thus the amended petition supersedes the original petition. Schweiger v. Loewi and Co., Inc. 65 Wis. 2d 56, 58, 221 N.W. 2d 882, 884 (1974) citing Werner v. Riemer, 255 Wis. 386, 388, 39 N.W. 2d 457, 917 (1949). The

responsive pleading, the motion to dismiss, was filed on January 29, 1991. This was within the 45 day time limit which commenced on January 16, 1991.

The petitioner also attacks the legal sufficiency of the responsive pleading. Under the law, the responsive pleading does not have to be an answer. Sec. 802.06(2), Wis. Stats. provides that the responsive pleading can be a motion, including a motion which asserts the lack of jurisdiction of the court. The respondent filed a responsive pleading, a motion to dismiss, in this case. The responsive pleading is legally sufficient.

THEREFORE, IT IS HEREBY ORDERED, that the motion to dismiss for lack of jurisdiction of the respondents, State of Wisconsin Department of Natural Resources and State of Wisconsin Department of Justice is granted. The motion of the petitioner to dismiss the respondents' answer, in essence to strike the answer as untimely filed and/or as legally insufficient, is denied.

Dated at Wausau, Wisconsin this 19 day of June, 1991.

BY THE COURT:

HON. ANN WALSH BRADLEY
Circuit Judge, Branch 3

APPENDIX E

COURT OF APPEALS
DECISION
DATED AND RELEASED
OCTOBER 13, 1992

No. 91-2246

IN COURT OF APPEALS
DISTRICT III

Leonard Salzman
Petitioner-Appellant,

v.

State of Wisconsin Department of Natural Resources and State of Wisconsin Department of Justice,
Respondents-Respondents.

APPEAL from an order of the circuit court for Marathon county: ANN WALSH BRADLEY, Judge. Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Leonard Salznman appeals an order that dismissed his declaratory judgement action against the state. His suit sought to challenge an order by the Wisconsin Department of Natural Resources that he remove over 600,000 tires from his property. The trial court ruled that Salzman's action was in effect a petition for judicial review of the DNR's order under chapter 227, Stats. Inasmuch as the petition was beyond the thirty-day deadline for seeking judicial review under sec. 227.53(1), the court dismissed the action as untimely. We agree with this analysis. Chapter 227 furnishes the

exclusive remedy for anyone aggrieved by a DNR order. If an aggrieved party fails to avail himself of the exclusive remedy chap. 227 provides, he has no further right to judicial review. Accordingly, the trial court correctly refused to permit Salzman to file a declaratory judgement action in order to circumvent chap. 227's exclusive judicial review procedures. We therefore affirm the trial court order dismissing Salzman's suit.

By the Court -- Order affirmed.

APPENDIX F

WISCONSIN STATUTE 144.449

144.449 Tire dumps. (1) DEFINITIONS. In this section:

(a) "Nuisance" means an unreasonable danger to public health, safety or welfare or the environment.

(b) "Tire dump" means any location that is used for storing or disposing of waste tires.

(c) "Waste tire" has the meaning given under s. 84.078(1)(b).

(2) DEPARTMENT AUTHORITY; ABATEMENT. If the department determines that a tire dump is a nuisance, it shall notify the person responsible for the nuisance and request that the tires be processed or removed within a specified period. If the person fails to take the requested action within a specified period, the department shall order the person to abate the nuisance within a specified period. If the person responsible for the nuisance is not the owner of the property on which the tire dump is located, the department may order the property owner to permit abatement of the nuisance. If the person responsible for the nuisance fails to comply with the order, the department may take any action necessary to abate the nuisance, including entering the property where the tire dump is located and confiscating the waste tires, or arranging to have the waste tires processed or removed.

(2r) ENFORCEMENT ACTION. To carry out a nuisance abatement under sub. (2), the department may refer a nuisance abatement to the attorney general for enforcement action.

(3) APPLICABILITY. This section does not apply to any of the following:

(a) A retail business where tires are sold if no more than 500 waste tires are kept on the premises at one time.

(b) The premises of a tire retreading business if no more than 3,000 waste tires are kept on the premises at one time.

(c) A premises where tires are removed from motor vehicles in the ordinary course of business if no more than 500 waste tires are kept on the premises at one time.

(d) A solid waste disposal facility where no more than 60,000 waste tires are stored above ground at one time if all tires received for storage are processed, buried or removed from the facility within one year after receipt.

(e) A site where no more than 250 waste tires are stored for agricultural uses.

(f) A site where a recovery activity, as defined in s. 159.17(1)(a), is carried on if no more than a 6-month inventory of tires is kept on the site.

(g) A site where tires are stored for use in constructing artificial reefs in waters of the state.

(h) An artificial reef constructed of waste tires.

(i) A construction site where waste tires are stored for use or used in road surfacing and construction of embankments.

(j) A solid waste disposal facility where waste tires are buried in compliance with rules promulgated by the department.

(4) ABATEMENT PRIORITIES. The order of priority for the department's abatement activities under sub. (2) shall be as follows:

(a) Tire dumps which contain more than 1,000,000 tires.

(b) Tire dumps which constitute a fire hazard or threat to public health.

(c) Tire dumps in densely populated areas.

(d) All other tire dumps.

(5) RECOVERY OF EXPENSES. The department may ask the attorney general to initiate a civil action to recover from the person responsible for the nuisance the reasonable and necessary costs incurred by the department for its nuisance abatement activities and its administrative and legal expenses related to the abatement. The department's certification of expenses shall be prima facie evidence that the expenses are reasonable and necessary.

(6) OTHER ABATEMENT. This section does not change the existing authority of the department to enforce any existing laws or of any person to abate a nuisance. The department may reimburse a person for the costs of any such abatement.